IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-886.

THE UPJOHN COMPANY AND GERARD THOMAS, VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL,

PETITIONERS,

v.

UNITED STATES OF AMERICA, AND DAVID E. NOWAK, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

[redacted] **Brief of Amicus Curiae New England Legal Foundation in Support of Petitioners.**

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Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae.

Pursuant to Rule 42 of the Rules of the Supreme Court, New England Legal Foundation moves the Court for leave to file its brief as amicus curiae bound with this motion in support of petitioners.

New England Legal Foundation has the consent of counsel for petitioners and counsel for respondents to the filing of this brief. Copies of the letters of counsel granting consent are on file with the Clerk of the Court.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the broad public interest. Policy for NELF is set by a board of directors composed of New England citizens, the majority of whom are

attorneys. The board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The issues in this case are of particular concern to NELF's board of directors. NELF numbers among its directors, the general counsels of five major New England corporations and two partners in major law firms, all of whom act as counsel for corporations and all of whom will be affected in their professional capacities by the rule formulated in this case. The existing conflict between the Circuits severely impedes their ability to effectively discharge their professional responsibility to the corporations they represent.

NELF's attorneys participated as amicus curiae in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), *Cary v. Brown,* 79-703 (1979), and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York,* 79-134 (1979). The Foundation, due to its unique public interest perspective and the interest of its members in the scope of the attorney-client privilege as it applies to corporations, believes that it can provide the Court with a more complete argument of the issues in this case.

The Foundation is particularly concerned that if the ruling of the United States Court of Appeals for the Sixth Circuit is allowed to stand, counsel and their corporate clients will remain without definitive guidance on an important and fundamental legal principle.

For the foregoing reasons New England Legal Foundation respectfully requests permission to participate as amicus curiae and to file the attached brief in support of petitioners.

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Brief of New England Legal Foundation in Support of Petitioners.

Introductory Statement.

Part I of this brief will discuss the history and rationale of the attorney-client privilege. Part II will survey the application of the privilege to corporations and the conflicting rules applied by the United States Circuit Courts of Appeal. Finally, Part III recommends that the Court adopt the subject matter test as the test which is most consistent with the role of attorneys in an adversary system.

The decision of the Sixth Circuit Court of Appeals here at issue illustrates the conflict among the Circuits which has left counsel without a definitive standard to apply when advising corporations on legal matters. Corporations have a central

role in the economy of the United States. The issue before the Court will have a far-reaching impact on the manner in which corporations are governed and on the economic health of the nation.

New England Legal Foundation adopts petitioners' statement of the opinion below and petitioners' statement of facts.

Question Presented.

Whether the attorney-client privilege protects the confidentiality of communications between attorneys for corporations and corporate employees.

Summary of Argument.

New England Legal Foundation argues as follows:

1. The attorney-client privilege is a fundamental part of the system of judicial administration. Any restriction upon the privilege in the corporate context impairs the ability of corporations to obtain legal advice and the ability of counsel to function in our adversary system.
2. The control group test adopted by the Sixth, and other Circuits, inhibits corporate government and is at odds with the public policies upon which the attorney-client privilege is based.
3. The subject matter test is consistent with the responsibilities of lawyers to their clients, both public and private, and with the objectives of the attorney-client privilege.

Argument.

I. The Attorney-Client Privilege: Rationale.

The attorney-client privilege is the oldest of the privileges

for confidential communications.[1] Originally derived from the status of the attorney as a professional, the privilege was based on the "oath and the honor" of the attorney[2] and belonged to the attorney, not the client. In general, Professor Wigmore's classic statement of the privilege is the one followed by the law today:

> Where legal advice of any kind is sought . . . from a professional legal advisor in his capacity as such . . . the communications relating to that purpose . . . made in confidence by the client . . . are at his instance permanently protected from disclosure . . . by himself or by the legal advisor . . . except the protection be waived.[3]

Since the late 1700's the privilege has rested upon two related assumptions, both based on public policy considerations. The first is that there is a need to remove the client's apprehension of compelled disclosure by the attorney he has consulted or retained. The purpose of the privilege is to enable the client to obtain the best possible legal advice based on counsel's fullest understanding of the facts, and the scope of the privilege must be such that it will encourage clients to make full disclosure to their attorneys. Under this theory, the privilege belongs to the client, not the attorney. *Fisher v. United States,* 425 U.S. 391, 403 (1976).

The second assumption is that unfettered communication between client and attorney enables the latter to act effectively and responsibly on behalf of his client. This assumption is based on the belief that the societal goal of achieving justice in an adversary system is best served by fully informed, responsible advocates.[4]

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[1] 8 Wigmore Evidence, § 2290 (McNaughton Rev., 1961).

[2] *Id.*

[3] *Id.*, § 2292.

[4] See generally, J. Weinstein and M. Berger, 2 Weinstein's Evidence ¶ 503[02], 503-15 (1979).

Early case law reflects a judicial concern for the privilege as a means of increasing the lawyer's ability to give complete, competent advice in complex civil litigation. In *Rochester City Bank v. Suydam, Sage & Co.*, 5 How. Pr. 254 (N.Y. S.Ct. 1851), the court asserted that the privilege is required solely for the purpose of managing litigation:

> If the facts thus communicated were liable to be extorted from the attorney or counsel, suitors would hesitate to employ them, to the great inconvenience of the court, and obstruction of judicial business. The rule we are considering, therefore, was adopted to remove this difficulty. 5 How. Pr. 254, at 258-59.

Similarly, in *United States v. Louisville and Nashville Railroad Company*, 236 U.S. 318 (1915), this court stated:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance. 236 U.S. at 336.

The objectives of the privilege, both as a means of fostering legal communication and as a method of case management central to the administration of justice have remained virtually unchanged since the middle of the nineteenth century.[5] The privilege is a fundamental part of this nation's judicial system:

> Our adversary system of litigation casts the lawyer in a role of fighter for the party he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change

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[5] See Note: The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 Harv. L. Rev. 464 (1977).

> our customs so as to make the lawyer amiable to routine examination upon the client's confidential disclosures regarding professional business.[6]

It is well established that the privilege applies to corporations, as well as to individuals. *Zenith Radio Corp. v. Radio Corp. of America,* 121 F. Supp. 792 (D. Del. 1954); *United States v. United Shoe Machinery Corp.,* 99 F. Supp. 357 (D. Mass. 1950). In 1962, a district court held, in *Radiant Burners, Inc. v. American Gas Association,* 207 F. Supp. 771 (N.D. Ill. 1962), that the privilege did not apply to corporations. *Radiant Burners* was reversed on appeal. 320 F. 2d 314 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963). The court stated that "based on history, principle, precedent and public policy the attorney-client privilege . . . is available to corporations." 320 F. 2d at 323. The Seventh Circuit held that the attorney-client privilege does not exist out of a personal right, but rather as a rule based on public policy, to facilitate the administration of justice:

> A corporation is entitled to the same treatment as any other "client"—no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof. 320 F. 2d at 324.

Although courts have embraced different approaches in defining the scope of privilege when the client is a corporation, the rationale of the privilege in the corporate context remains basically unchanged. The privilege applies to corporations, as well as to individuals, on the utilitarian assumption that the administration of justice, and the ability of counsel

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[6] McCormack, Evidence § 87 at 176 (1972).

to provide competent legal representation cannot be met without it.[7]

The difficulties encountered by courts in the application of the privilege to corporations stem not so much from a need to redesign the privilege as from a failure to recognize that the primary purpose of the privilege is to facilitate the giving of reasoned, effective legal advice, necessary to insure compliance with the myriad laws affecting corporations. The conflicting views among federal courts on the scope of the corporate privilege is the result of a legal fiction, i.e., that the corporate "client" is by definition different than the individual client. The Sixth Circuit's opinion in *United States v. Upjohn Co.*, 600 F. 2d 1223 (1979) is, in fact, based on this misconception.

> The application of the privilege to corporate "clients" poses a somewhat different problem. Since corporations are inanimate, artificial entities, the attorney-client relationship is conceptually more difficult, and its underlying principles are less obvious. 600 F. 2d at 1226.

This view of the scope of corporate attorney-client privilege is based on the unwarranted assumption that the lawyer's function when his client is a corporation, is qualitatively different from his function when his client is an individual.

> As clients, corporations can communicate to attorneys only through agents. ... [M]arketing officials have knowledge and duties related only to selling, while plant supervisors have knowledge and duties related only to production. It is only the senior management, guiding

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[7] There seems little doubt that the privilege applies to corporations. Note: The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach, 69 Mich. L. Rev. 360 (1970); Comment: The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics and Its Possible Curtailment, 56 N.W.U. L. Rev. 235 (1961); Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953 (1956).

> and integrating the several operations, which can be said to possess an identity analogous to the corporation as a whole. 600 F. 2d at 1226.

The analysis of the Court below is simply inaccurate. The Court attempts to define the corporate "client" in terms analogous to individuals, and ignores the fact that the policies underlying the privilege have changed. Today, the privilege is not only designed to promote disclosure by clients to their attorneys, but also to take account of the day-to-day workings of a lawyer. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (D. S.C. 1974). Because it is difficult to ascertain whether the privilege does, in fact, promote disclosure, there is a third policy that the privilege ought to be "strictly confined within the narrowest limits consistent with the logic of its principle."[8]

The conflict inherent in these policies is not present when the client is an individual, but when the client is a corporation, operating through agents and employees, the policies collide and lead to judicial confusion. This confusion stems from the failure of courts to recognize the privilege as an instrument of judicial administration. Counsel play a crucial administrative role in the judicial system, and the single most compelling reason for the attorney-client privilege is to permit counsel to discharge his professional responsibilities in that system.

The decision of the court of appeals here in issue illustrates this confusion. In *United States v. Upjohn Co., supra,* the court stated:

> This policy of promoting full disclosure to counsel serves to implement the notion . . . that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's interests. 600 F. 2d at 1226.

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[8] Wigmore, § 2291 at 554.

Thus, the court first acknowledges the instrumental purpose of the privilege and then applies the privilege in a manner which destroys counsel's ability to meet his responsibilities to either his client or to the judicial system. The decision of the court below represents a substantial departure from the policies underlying the privilege and seriously impairs the ability of counsel to function in an adversary system.

II. The Control Group Test.

While it is settled that the attorney-client privilege applies to corporations, there are now conflicting views among the circuit courts as to the scope of the privilege. In *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom., General Electric Co. v. Kirkpatrick,* 312 F. 2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943 (1963), the court first set forth the "control group" test adopted by the Sixth Circuit in the case at bar. Subsequently, the test was adopted by the Tenth Circuit in *Hogan v. Zletz,* 43 F.R.D. 308 (N.D. Okla. 1967), *aff'd. sub nom., Natta v. Hogan,* 392 F. 2d 686 (10th Cir. 1968). Under *City of Philadelphia v. Westinghouse Electric Corp., supra,* an employee's statement to corporate counsel is not considered a confidential attorney-client communication unless the employee:

> is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, of if he is an authorized member of a body or group which has that authority. 210 F. Supp. at 485.

The control group test is based on a view of the attorney-client privilege as a personal privilege. *Radiant Burners Inc. v. American Gas Association, supra.* The "control group" of a corporation, normally consisting of its board of directors

and chief officers, is regarded as that group of people in a company that is most analogous to an individual client, because it is the responsibility of the officers and directors "to fear for the well-being of the corporation just as an individual fears for his own well-being."[9]

The protection of the attorney-client privilege is limited under the test to communications between senior management and counsel.[10] The test assumes that, in its absence, corporations would create a "zone of silence" around corporate affairs.

> Where corporations are involved, with their . . . masses of documents, and frequent dealings with lawyers, the zone of silence grows large. Few judges . . . would long tolerate any . . . privilege that allowed corporations to insulate all their activities by discussing them with legal advisors.[11]

Arguing inconsistently that the scope of the privilege should be limited to its purpose because the privilege acts as "a bar to the truth" the Sixth Circuit held in the instant case that the test actually promotes consultation with counsel and thereby achieves the objective of the privilege. *United States v. Upjohn Co., supra,* 600 F. 2d at 1227.

Yet the test has been criticized as reflecting a restricted view of corporate management unrelated to the purposes of

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[9] Miller, The Corporate Attorney-Client Privilege and the Work Product Doctrine: Protection from Compelled Disclosure in Criminal Investigation of a Corporation, 12 U.S.F. L. Rev. 569, 572 (1978).

[10] See, e.g., *Garrison v. General Motors Corp.*, 213 F. Supp. 515, 518 (S.D. Cal. 1963), in which the control group was held to include directors, officers, department heads, division managers and their assistants and division chief engineers.

[11] Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 955-56 (1956). See generally, Note: Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424 (1970).

the attorney-client privilege. In 1970 the Seventh Circuit in *Harper & Row Publishers, Inc. v. Decker,* 423 F. 2d 487 (7th Cir. 1970), affirmed by an equally divided court, 400 U.S. 348 (1971), rejected the control group test. The court adopted a broader and more balanced test for application of the attorney-client privilege to corporations. Under *Harper & Row, supra,* the privilege applies to corporations (1) if the employee, though not a member of the corporation's control group, makes a communication at the direction of his superiors in the corporation and (2) the subject matter of the communication is the performance by the employee of the duties of his employment. 423 F. 2d at 491-492.

This approach has been criticized as susceptible to abuse in litigation. The court below expressed the fear that *Harper & Row* would allow corporations to direct employees to channel all business reports to corporate attorneys, thereby rendering all such information privileged. *United States v. Upjohn Co., supra,* 600 F. 2d at 1227.[12]

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[12] This fear is ill-founded given the fact that business records are not immune to discovery. In *United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357 (D. Mass. 1950), Judge Wyzanski set forth the requisites of a justified claim of the attorney-client privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. 89 F. Supp. at 358-359.

Business records routinely mailed to counsel to protect them from discovery would not meet this test.

In *Diversified Industries, Inc. v. Meredith,* 572 F. 2d 596 (8th Cir. 1977), the Eighth Circuit also rejected the control group test and adopted the subject matter test:

> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. 572 F. 2d at 609.

Diversified Industries represents the better approach to application of the privilege to corporations. The court in *Diversified Industries* recognized the need of counsel to obtain information from middle management and non-management personnel.[13] The court reasoned that:

> [T]he control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege [citation omitted]. Moreover, the test may result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activity. 572 F. 2d at 609.

The distinction between the control group test and the subject matter test is the extent to which confidential employee communications to counsel are protected by the corporate attorney-client privilege. In the instant case, the court chose the control group test because:

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[13] Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C. Ind. & Comm. L. Rev. 873 (1970).

> The "subject matter" test encourages senior managers purposely to ignore important information they have good business reasons to know and use. *United States v. Upjohn Co., supra,* 600 F. 2d at 1227.

The court further stated:

> The "control group" test recognizes that a corporation's decision-makers, like individual clients, must communicate freely and confidentially to counsel. By protecting these communications, the "control group" test promotes consultation with counsel and thereby achieves its objective. 600 F. 2d at 1227.

The court also noted that application of subject matter test to corporations could result in counsel being the exclusive repository of unpleasant facts. 600 F. 2d at 1227. In the Sixth Circuit's view a party seeking discovery, in a subject matter test jurisdiction, would be forced to depose or otherwise interrogate less senior employees rather than management. The court opted for the control group test on the theory that the subject matter test would impose too heavy a discovery burden on opposing counsel.

This theory is at best illogical. It is based on factors relating to discovery and not upon the policies underlying the attorney-client privilege. The privilege protects communication regardless of the ease with which an adversary can obtain discovery. Moreover, the control group test does not accomplish its objective as a discovery tool. Since the test does not protect communications from lower-level employees to corporate counsel, it is difficult to fathom why such communications should be made. Even assuming that the communications are made, opposing counsel, faced with a choice of interrogating knowledgeable lower-level employees or management which is only dimly aware of the facts, would invariably opt for the former. The attorney-client privilege protects confidential communications whether or not the in-

formation can be obtained from an unprivileged source. The relative burden of discovery in an adversary system is not therefore a basis for destroying the privilege.[14]

The Third Circuit has also adopted the control group test which it recognized as affording the corporation the bare minimum of protection. In *In re Grand Jury Investigation,* 599 F. 2d 1224 (3d Cir. 1979), the court rejected the practical problem acknowledged in *Diversified Industries, supra,* that counsel may have to obtain "information relevant to a legal problem from middle management and nonmanagement personnel as well as from top executives," and therefore that a restrictive test for the attorney-client privilege might inhibit the free flow of information to counsel. 572 F. 2d at 608-09.

In the view of the Third Circuit, the privilege belongs to the corporation, and employees who communicate with counsel do so at their own risk because such communications would not be privileged. The court assumed that innocent employees would communicate with counsel even absent the privilege. Finally, the Third Circuit also rejected the subject matter test because the public policies advanced by that test were adequately protected by the work product doctrine. *In re Grand Jury Investigation, supra,* 599 F. 2d at 1237.

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[14] The decision of the court below ignores the discovery mechanisms available to litigants under the Federal Rules of Civil Procedure. Rule 26(b)(3) requires the production of all documents relevant to the litigation. Rule 33 requires a corporation to assemble and provide all information in the possession of its employees. Under Rule 30(b)(6), a corporation may be required to designate a witness or witnesses to testify to matters "known or reasonably available to the organization."

Attempts to circumvent the rules of discovery by forcing corporate counsel to testify or surrender notes and memoranda arise with increasing frequency. See, e.g., *In re Grand Jury Proceedings,* 604 F. 2d 798 (3d Cir. 1979); *In re Grand Jury Subpoena etc.,* 599 F. 2d 504 (2d Cir. 1979).

The holdings of the Third and Sixth Circuits confuse the corporate attorney-client privilege with the work-product doctrine. The work-product doctrine protects from discovery materials prepared or collected by an attorney "in the course of preparation for possible litigation." *Hickman v. Taylor,* 329 U.S. 495, 505 (1947). As currently embodied in Rule 26(b)(3), Federal Rules of Civil Procedure, the doctrine also protects against discovery of "the mental impressions, conclusions, opinions, or legal theories of an attorney." The work-product doctrine may be overcome upon a showing that a party "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain . . . the materials by other means." Rule 26(b)(3), Federal Rules of Civil Procedure. The work-product doctrine is qualified; the attorney-client privilege is not. Materials otherwise protected may be discoverable under the work-product doctrine whereas communications within the attorney-client privilege may not be. In brief, the attorney-client privilege is not a discovery mechanism.

To the extent that the scope of the attorney-client privilege in a corporate setting turns upon well-established public policy considerations, there is little doubt that the control group test should be rejected by this Court. The application of this fundamental rule of law should not be subject to disparate results based on choice of forum. The test is inconsistent with the policies on which the privilege is based and fails to recognize the organizational and operating structure of the modern corporation. More important, corporate lawyers play an important role in policing corporate conduct, and to the extent that counsel may be unable to properly represent his client in a control group jurisdiction, the interests of justice will not be served. *A.B. Dick Co. v. Marr,* 95 F. Supp. 83, 102 (S.D. N.Y. 1950), *appeal dism'd.,* 197 F. 2d 498 (2d Cir. 1952), *cert. denied,* 344 U.S. 878 (1952).

III. This Court Should Adopt the Subject Matter Test.

The public policy underpinnings of the attorney-client privilege are strongest in the corporate area. Unlike individuals, corporations have a continual need for legal advice and a need for predictability in their relations with lawyers.

In the modern corporation, executives are not involved in the day-to-day operations, but rather the ultimate responsibility for decisions, including legal analysis, is often delegated to subordinate employees. Senior management receives information from division heads, salesmen and counsel. Most of the legal advice obtained by management is not in anticipation of litigation but rather reflects good management.

In a control group jurisdiction, counsel is presented with an inherent contradiction in his role as legal advisor. Counsel either advises the corporation without all of the relevant facts or obtains the information from corporate employees at the risk of having to divulge it to his adversary. At the very least, counsel should be confident that his efforts to assemble information will not prove detrimental to his client. The test adopted by the court below places counsel in an uncertain position with management which adversely affects corporate government. As applied in the instant case, the test not only inhibits the flow of information between the company and counsel, it also establishes the directors, officers, division heads and counsel as enclaves of adverse interest. The test imposes an artificial mode of management, incapable of precise definition and impossible of practical application. Because there is no definable control group in every corporation, courts will have to redefine the scope of the privilege in each case in which it is questioned.

Corporations are increasingly subject to regulation and counsel plays an important role in assuring compliance with

regulatory schemes. The public, as well as regulators, expect counsel to detect and prevent illegal business activities across a broad spectrum of the law.[15] *Diversified Industries, Inc. v. Meredith, supra,* 572 F. 2d at 609. Without information, counsel will be inhibited in his efforts to obtain compliance with the laws regulating corporate conduct.

The subject matter test is consistent with both the rationale of the attorney-client privilege and the role of counsel in an adversary system. The subject matter test protects communications between the corporate attorney and corporate employees when the communication is made at the direction of the employee's superiors and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. *Harper & Row Publishers, Inc. v. Decker, supra.*

As expanded in *Diversified Industries, Inc. v. Meredith, supra,* the test also includes a requirement that the communication directed by corporate superiors and made by the lower-level employee be for the purpose of securing legal advice. 572 F. 2d 596, 609. The court in *In re Ampicillin Antitrust Litigation,* 81 F.R.D. 377 (D. D.C. 1978) added an additional requirement. Only those communications which are believed to be relevant to a particular legal problem are within the privilege. 81 F.R.D. at 387.

It is imperative that the corporate lawyer obtain information from those employees immediately involved in the problem area. Since the employees who have knowledge of the facts will rarely be officers or directors, the subject matter test logically focuses on the subject matter of the communication and the context in which the communication was made

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[15] See, e.g., The Securities and Exchange Commission: Proposals Concerning Disclosure of Relationships Between Attorneys and Registered Corporations, 44 Fed. Reg. 44,881, 44,882 (1972).

rather than defining the privilege in terms of the corporate status of the employee. And as the court noted in *In re Ampicillin Antitrust Litigation, supra,* by limiting the privilege to those communications believed to be relevant to a legal issue, the subject matter test takes into account the corporate business form while

> strik[ing] a balance between the privilege's goal of promoting freedom of consultation and full disclosure between an attorney and a seeker of legal services, and the law's need for relevant evidence. 81 F.R.D. at 387.[16]

The importance of predictability in the application of the corporate attorney-client privilege cannot be overemphasized. Attorneys will have to communicate with a number of corporate employees, particularly when complex litigation is involved. If such communications are never privileged then the purpose of the privilege, to promote full and frank discussion is defeated. *In re Ampicillin Antitrust Litigation,* 81 F.R.D. 377 (1978); *Burlington Industries v. Exxon Corporation,* 65 F.R.D. 26 (D. Md. 1974).

At a minimum, counsel should have a reasonable certainty at the time the communication is made that it will be within the privilege. The subject matter test provides such predictability and is, therefore, in accord with the policies which this court has recognized as the basis of the privilege.

Conclusion.

Corporations have demonstrated unprecedented success as economic vehicles. That success is not a sufficient ground for destroying the attorney-client privilege or the public policies upon which it is based. The control group test threatens the ability of corporations to comply with all regulation. It is not

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[16] 2 Weinstein's Evidence, ¶ 503(b)[04] at 503-44 (1979).

simply a judicially created rule, designed to ease the relative burden of discovery, but rather, in its practical implications, threatens the very existence of the modern corporation.

The public interest will be served best by the pronouncement by this Court of a clear standard for the corporate attorney-client privilege in a manner consistent with the role of counsel in an adversary system.

Respectfully submitted,

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